

Shellmaker, Inc., and Bayside Dredging Company, Inc. and Operating Engineers, Local Union No. 3, International Union of Operating Engineers, AFL-CIO. Case 20-CA-16188

December 8, 1982

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND
HUNTER

On July 16, 1982, Administrative Law Judge Jay R. Pollack issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Party filed exceptions and a supporting brief, and Respondents filed a brief in answer to exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge: I heard this case in San Francisco, California, on April 1 and 6, 1982. Operating Engineers, Local Union No. 3, International Union of Operating Engineers, AFL-CIO (the Union), filed an original charge on April 22, 1981,¹ against Shellmaker, Inc. (Respondent Shellmaker), and Bayside Dredging Company, Inc. (Respondent Bayside), herein collectively called Respondents. The charge was subsequently amended on June 22, July 24, and August 13. On August 27, the Acting Regional Director for Region 20 of the National Labor Relations Board issued a complaint and notice of hearing against Respondents.

The complaint alleges in substance that Respondent Bayside is an *alter ego* of Respondent Shellmaker and that Respondents constitute a single business enterprise. The complaint further alleges that Respondents violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (the Act), by failing and refusing to apply the multiemployer collective-bargaining agreement between the Union and Respondent Shellmaker to the

employees of Respondent Bayside. Respondents contend that Shellmaker and Bayside are entirely separate businesses. Further, Respondents deny the commission of any unfair labor practices.

All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based upon the entire record, from my observation of the demeanor of the witnesses, and having considered the post-trial briefs submitted on behalf of the parties,² I make the following:

I. FINDINGS OF FACT AND CONCLUSIONS

A. Background

Respondent Shellmaker has been engaged in the dredging business in southern California for approximately 40 years. In 1968, Respondent Shellmaker began operations in northern California. Respondent Shellmaker's northern California operations are based at an area now known as Port Sonoma in Sonoma County, California. At all times material herein, Respondent Shellmaker has been a member of the Dredging Contractors Association, a multiemployer bargaining group. The Dredging Contractors Association and its employer-members have been party to a series of collective-bargaining agreements covering the employees of the employer-members of the Association.³ The most recent collective-bargaining agreement between the Union and the Association is effective by its terms from July 1, 1980, to June 30, 1983. The appropriate bargaining unit is all employees employed by the employer-members of the Association, performing work within the scope of the agreement and within the territorial jurisdiction of the agreement. The agreement excepts from coverage superintendents, assistant superintendents, captains, launch operators, general foremen, timekeepers, messenger boys, guards, confidential employees, and office help.

William P. Boland was the president of Respondent Shellmaker for approximately 22 years until March 2, 1982, when he became its chairman of the board. Respondent Shellmaker's current officers are Dick Mallard, president; Richard Solari, vice president; William Harris, southern California vice president; and Georgina Bonavitch, secretary-treasurer. William Boland owns 51 percent of Respondent Shellmaker's stock. The other stockholders are Granite Construction Company (40 percent) and Dick Mallard (9 percent). The corporate directors are William Boland, Mallard, and Solari.

Respondent Bayside was incorporated in California on December 15, 1980. At its incorporation, Respondent Bayside's three officers, directors, and stockholders were William Boland, Dolores Lara Boland, William's wife, and Bryan Boland, William's nephew. In January 1981, William Boland sold his stock in equal parts to Dolores Boland, Bryan Boland, and Magdalena Hickey, Dolores'

² On June 14, 1982, I received a letter from Respondent Bayside in reply to the briefs submitted by the General Counsel and the Union. Since there is no provision for reply briefs under the Board's Rules and Regulations, I have disregarded Bayside's letter.

³ The parties stipulated that the employer-members of the Association collectively meet the Board's direct inflow standard for the assertion of jurisdiction.

¹ Unless otherwise stated, all dates refer to calendar year 1981.

sister. Since January 1981, Bryan Boland has been president, Dolores Boland has been vice president, and Hickey has been treasurer of Respondent Bayside. Respondent Bayside commenced operations on or about April 4, 1981. Respondent Bayside operates a dredge entitled the "Turnabout" which is specially designed for dredging in and about marinas. The Turnabout is chartered by Respondent Bayside from Lara Enterprises, the owner of the Turnabout, on a bareboat charter basis; i.e., without crew or insurance.

Lara Enterprises, Inc., is a California corporation formed in July 1979. Dolores Boland is president; Magdalena Hickey is vice president; and Rosemary Overby is vice president and secretary of Lara Enterprises. The three officers are also the only three stockholders of the corporation. Dolores Boland owns 62-1/2 percent; Magdalena Hickey owns 15 percent; and Rosemary Overby owns 22-1/2 percent of the shares of the corporation. Lara Enterprises was alleged as a Charged Party in the second amended charge, filed on July 24. However, Lara Enterprises was deleted as a party in the third amended charge, filed on August 12. The complaint does not allege that Lara Enterprises is an *alter ego* of, or single employer with, either of Respondents herein.

Respondent Shellmaker is located where the Petaluma River empties into San Pablo Bay at Port Sonoma Marina. Port Sonoma Marina, Inc., is a wholly owned subsidiary of Respondent Shellmaker which operates the port property. Port Sonoma Marina employs its own staff, which do general carpentry and maintenance work. Respondent Shellmaker and Respondent Bayside have separate operating yards at Port Sonoma. Further, Respondent Bayside shares office space with Lara Enterprises at Port Sonoma.

B. The Construction of the Turnabout and the Formation of Respondent Bayside

In the summer of 1980, William Boland began construction of an 8-inch dredge, later to be named the Turnabout.⁴ The 8-inch dredge was specifically designed by William Boland for dredging in small marinas, and, particularly, for dredging at Port Sonoma in tight quarters without the necessity of moving the docks. The construction of the Turnabout was performed by employees of Respondent Shellmaker. However, construction was financed by the Shellmaker profit-sharing plan,⁵ which reimbursed Respondent Shellmaker for the parts and labor involved.

William Boland testified that he planned the Turnabout to operate with a two-man crew. He further testified that he knew Respondent Shellmaker could not operate the new dredge because the labor agreement with the Union required a four-man crew. The new dredge would be too expensive to operate with a four-man crew. Initially, William Boland intended the Shellmaker profit-sharing plan to own the dredge and to lease it out

on a bareboat charter basis. However, the attorney for the profit-sharing plan advised against the plan going into business.

In the fall of 1980, Bryan Boland, William's nephew, moved to northern California and began working on the construction of the Turnabout.⁶ Bryan had been working as a deckhand on dredges operated by Respondent Shellmaker in southern California. Bryan worked on Respondent Shellmaker's payroll until Respondent Bayside commenced operations in April. As stated earlier, Respondent Bayside was incorporated in December 1980. There is no dispute that the purpose of the new corporation was to operate the new 8-inch dredge upon completion of the then pending construction.

Respondent Bayside was initially incorporated by William, Dolores, and Bryan Boland. Each contributed \$300 for 300 shares of stock. At the time of incorporation Bryan was president; William was vice president; and Dolores was secretary-treasurer. As stated earlier, in January 1981, William Boland resigned and sold his stock, in equal shares, to Bryan, Dolores, and Magdalena Hickey. During the spring of 1981, Respondent Bayside moved into office space at Port Sonoma already occupied by Lara Enterprises. The office space was leased from Port Sonoma Marina to Dolores Boland who in turn subleased space to Lara Enterprises, Respondent Bayside, Port Sonoma Marina, and another unrelated business.

The initial capital for Respondent Bayside came from personal loans from Dolores and Bryan Boland. These loans were repaid when Respondent Bayside borrowed \$50,000 from the Shellmaker profit-sharing plan. Respondent Bayside had been previously turned down for a loan by a bank because Dolores Boland had refused to personally guarantee the loan. The loan from the profit-sharing plan was unsecured. In early 1982, Respondent Bayside renegotiated its loan from the profit-sharing plan.⁷ The new loan was for \$60,000 with an interest rate equivalent to what the profit-sharing plan was earning in its money market account, but at a rate lower than that of the original loan. Respondent Bayside has made interest payments but has not repaid any of the principal of these loans.

Upon the completion of construction of the Turnabout, Lara Enterprises purchased the dredge from the Shellmaker profit-sharing plan for \$100,000, a profit of \$15,000 for the plan.⁸ Upon purchasing the Turnabout, Lara Enterprises signed a bareboat charter leasing the Turnabout to Respondent Bayside for \$3,500 per month. The lease was for a term of 3 years and month to month, thereafter. After 1 year, the rental fee was raised to \$6,300 per month.⁹ In April, Respondent Bayside com-

⁴ Bryan Boland moved to Port Sonoma Marina in the fall of 1980. He rented a trailer there at a favorable price.

⁷ Respondent Bayside did not make a profit during its first year of operations.

⁸ There is testimony from Dolores Boland tending to show that the dredge was in fact worth \$150,000. The lease between Lara Enterprises and Respondent Bayside initially set the value of the Turnabout at \$150,000 and was subsequently amended to a value of \$250,000.

⁹ The General Counsel and the Charging Party argue that the rental fee was considerably less than market value. As stated earlier, the Turnabout was a new type of dredge. Thus, there is no record evidence to establish the market value for the lease of the Turnabout.

⁴ The size of a dredge is determined by the diameter of the discharge pipe used by the dredge. Respondent Shellmaker operates three 16-inch dredges.

⁵ The Shellmaker profit-sharing plan is a separate corporation. The trustees of the profit-sharing plan are William Boland and Dolores Boland.

menced dredging at the Port Sonoma Marina. Respondent Bayside operated under a contractor's license in its own name with Dolores Boland registered as responsible managing officer. Bryan Boland, inexperienced and having not bid a job before, was unable to explain how Respondent Bayside's price for this work was determined. According to William Boland, when Respondent Bayside commenced dredging it was on a cost-plus basis. After half the job was completed, in the spring of 1981, an hourly rate was utilized. William Boland's testimony was corroborated by a letter agreement dated March 22 signed by Bryan Boland and Betty J. Krambs, secretary for Port Sonoma Marina.

C. The Relationship Between the Companies

1. Interrelation of operations

While both Respondents are in the dredging business, they do not service the same customers. Respondent Shellmaker operates three 16-inch dredges in northern California. Substantially all of Respondent Shellmaker's business is with the United States Army Corps of Engineers. Respondent Bayside, on the other hand, using the 8-inch dredge, the Turnabout, specializes in dredging small marinas.

The General Counsel offered evidence that Respondent Bayside performed work for Vista Bahia, a former customer of Respondent Shellmaker. However, the credible evidence shows that William Boland attempted to keep Vista Bahia as a customer for Respondent Shellmaker. Problems arose regarding the disposal area for the dredging work. When it finally became apparent that the disposal area permitted by the governmental authorities was too small for a 16-inch dredge, William Boland referred Vista Bahia to Dolores Boland. Dolores then contracted with Vista Bahia for the dredging work to be done by the Turnabout. During the performance of the dredging work, certain problems arose between Respondent Bayside and Vista Bahia. Gary Wilson, representative of Vista Bahia, attempted to solicit William Boland's aid in resolving these problems. However, Wilson was told by William Boland that he would have to resolve the problems with Dolores and Bryan Boland. Wilson also asked Dolores if William Boland could be called in as "a sort of mediator" to help resolve the problems. Wilson testified that he was turned down in a "rather heavy fashion."

As stated earlier, upon going into business, Respondent Bayside commenced dredging operations at Port Sonoma Marina. Respondent Bayside has billed Port Sonoma for dredging work on an hourly basis. Dick Amaral, supervisor for Port Sonoma's crew, is responsible for confirming the work performed by Respondent Bayside. While Amaral directs Respondent Bayside with regard to the areas of the marine to be dredged, there is no evidence that Amaral directs or supervises the employees of Respondent Bayside. The General Counsel offered evidence that two employees under Amaral's supervision were working on the Turnabout during April. However, the work performed by these Port Sonoma employees was the installation of floorboards. In the rush to get the Turnabout in business, the dredge commenced operations

without the floorboards and the floorboards were installed while the dredge was in operation at Port Sonoma.

As stated earlier, the Turnabout was constructed by employees of Respondent Shellmaker. Respondent Shellmaker has constructed at least five other dredges. The sale of the dredge to Lara Enterprises included a written 6-month warranty. The warranty was orally extended for an additional 6 months. Thus, after the sale of the Turnabout, employees of Respondent Shellmaker performed work on the dredge. However, there is no evidence that the work performed was other than work covered by the warranty.¹⁰

There is no evidence of employee interchange between the two companies. As stated earlier, while awaiting the completion of the construction of the Turnabout, Bryan Boland worked for Respondent Shellmaker. In the initial hiring of employees for Respondent Bayside, Bryan hired one former employee of Port Sonoma Marina. Thereafter, when an opening arose, Bryan hired a former employee of Respondent Shellmaker. However, there is no evidence that employees were transferred between companies or performed work for one company while on the payroll of the other.

Respondent Bayside and Lara Enterprises share the same office space. Magdalena Hickey spends half her time performing office work for Respondent Bayside and the other half of her time performing similar work for Lara Enterprises. Respondent Shellmaker's office, while also located at Port Sonoma, is in a separate building from Respondent Bayside. Since November, Respondent Bayside has maintained an operating yard at Port Sonoma, separate and apart from Respondent Shellmaker's yard. When Respondent Bayside first commenced operations it had no yard and stored equipment at Respondent Shellmaker's yard while dredging at Port Sonoma. However, such jobsite storage is common in the industry. When the Turnabout was moved to Vista Bahia, Respondent Bayside stored its equipment in a trailer at that jobsite. Respondent Bayside, at the time of the hearing, had made no payments for rent for its yard. Rather, Respondent Bayside had performed dredging work in lieu of rent. According to William Boland, Respondent Bayside would begin paying \$500-per-month rent in July 1982.

The General Counsel subpoenaed numerous and various business records of Respondents Shellmaker and Bayside, which records were produced at the hearing. The parties stipulated that Respondents Shellmaker and Bayside maintain separate books and records. Different persons perform bookkeeping functions for the two companies. Each company bills the other for services performed. While daily logs were kept for the dredging at Port Sonoma, daily logs were not kept for the dredging performed in lieu of rent.

The General Counsel contends that the two Respondents use the same equipment. However, the evidence does not support this contention. On one occasion when Bryan Boland used equipment of Respondent Shell-

¹⁰ Respondent Shellmaker's employees were told that they were performing warranty work.

maker, he was instructed by Ed Storey, Respondent Shellmaker's superintendent, that he was not to use Respondent Shellmaker's equipment without permission. On other occasions, Bryan Boland used equipment of Respondent Shellmaker and was charged by Storey for such use. On some occasions, Respondent Bayside used equipment belonging to Port Sonoma Marina with the permission of Amaral. These incidents occurred while Respondent Bayside was performing work for Port Sonoma Marina and, thus, it was in Amaral's interest to expedite the work. Bryan Boland testified that other customers have similarly lent him use of equipment, without charge, in order to expedite the work.

2. Common ownership and management

As stated earlier, William Boland, Granite Construction Company, and Dick Mallard are the three stockholders of Respondent Shellmaker. Bryan Boland, Dolores Boland, an Magdalena Hickey are the three stockholders of Respondent Bayside. William Boland resigned from Respondent Bayside and sold his stock in the Corporation, prior to the commencement of business.

During 1981, William Boland, as president of Respondent Shellmaker, was responsible for the management decisions of that Company. Dick Mallard is now president of Respondent Shellmaker. Bryan Boland is president of Respondent Bayside and apparently runs the day-to-day business of that Company. The General Counsel and Charging Party vehemently argue that Bryan, 20 years' old at the inception of Respondent Bayside, has no relevant experience and does not manage the business. Rather, the General Counsel and the Charging Party argue that Bryan is simply a figurehead and that "William and Dolores Boland make the critical management decisions and control the labor relations of Bayside." However, there is no evidence that William Boland made any management decisions for Respondent Bayside. William, on behalf of Port Sonoma Marina, negotiated with Bryan Boland concerning the payment for dredging work. In actuality, William set prices which Bryan Boland accepted without argument. Respondent Bayside's exchange of services for rent was arranged in the same manner. While Bryan Boland did not appear knowledgeable as to the management of the business or the bidding of contracts, I cannot draw the inference that William Boland was in fact managing Respondent Bayside. Dolores Boland negotiated Respondent Bayside's agreement with Vista Bahia, including a 10-percent commission for Lara Enterprises. Further, Dolores set the charter rate charged to Respondent Bayside by Lara Enterprises, which charges Bryan Boland accepted without protest. The relationship between Lara Enterprises and Respondent Bayside does not appear to be arm's length. However, as noted earlier, Lara Enterprises is not a party to this case. While Dolores Boland appears to participate in the management of Respondent Bayside, she is more knowledgeable as to its operations than Bryan; there is no evidence that Dolores participates in the management of Respondent Shellmaker. Dolores Boland formerly was office manager for Respondent Shellmaker and once performed as an assistant job superintendent but has not worked for Respondent Shellmaker

for 5 years. Dolores Boland was a corporate director of Respondent Shellmaker for 5 to 7 years, ending in March 1982.

There is no evidence of common supervision of the employees of Respondents. Dick Amaral's overseeing of Respondent Bayside's dredging operations is explained by the interest of his employer, Port Sonoma Marina, in having the dredging work performed to its satisfaction. Further, Amaral had the responsibility of approving the charges for such work. Ed Storey supervises Respondent Shellmaker's employees and Bryan Boland supervises Respondent Bayside's employees. Other than Amaral's involvement with the dredging of Port Sonoma Marina, there is no evidence of supervision of the employees of one company by a supervisor of the other.

3. Centralized control of labor relations

The uncontradicted evidence is that Bryan Boland makes all labor relations decisions for Respondent Bayside. He is the one that did all the hiring and firing for that Company. Bryan Boland makes the job assignments and supervises the operations of the dredge. Bryan set the initial wage rates and fringe benefits for Respondent Bayside's employees and thereafter communicated with employees about raising those terms of employment. There is no evidence that William Boland was involved in the labor relations of Respondent Bayside. The General Counsel and the Charging Party argue that William Boland made the decision that the Turnabout would be nonunion. The evidence does establish that William decided that Respondent Shellmaker would not operate the Turnabout but does not establish that William otherwise took steps to make the Turnabout nonunion.

The labor negotiations of Respondent Shellmaker are handled by the Association. The bargaining unit employees' wages and fringe benefits are controlled by the collective-bargaining agreement between the Union and the Association. The terms and conditions of employment of the office and management personnel were apparently set by William Boland and his supervisors. The Port Sonoma Marina employees have never been covered by the collective-bargaining agreement between the Union and the Association. The terms and conditions of employment apparently were set by William Boland and his supervisors. There is no evidence that Bryan or Dolores Boland were involved in the labor relations of Respondent Shellmaker.

4. Other factors

The General Counsel and the Charging Party argue that the dealing between the Bolands are anything but arm's length and, therefore, that the establishment of Respondent Bayside was simply a device for Respondent Shellmaker to avoid the collective-bargaining agreement.

First, Respondent Shellmaker commenced building the Turnabout knowing that it would not operate the dredge itself. Thereafter, the Shellmaker profit-sharing plan financed the construction of the dredge. The profit-sharing plan sold the dredge to Lara Enterprises, controlled by Dolores Boland, one of the two profit-sharing plan trustees. The General Counsel and the Charging Party

argue, based on the contract between Lara Enterprises and Respondent Bayside, that the value of the Turnabout was \$150,000 rather than the \$100,000 paid to the profit-sharing plan. But, as noted earlier, the Turnabout was a new piece of equipment and its fair market value was not established.

Second, Respondent Bayside was capitalized with only \$900. After a bank would not lend money to Respondent Bayside, the Shellmaker profit-sharing plan granted Respondent Bayside a \$50,000 unsecured loan. When Respondent Bayside needed more money, the profit-sharing plan rewrote the loan for \$60,000, at a lower interest rate.

Third, in December, Respondent Shellmaker paid \$9,500 to Respondent Bayside for certain pump parts. Respondent Bayside had previously received these pump parts from William Boland, free of charge. William Boland testified that he received these pump parts as a personal gift from Olin Jones, a contractor in the sand business for whom William had done favors in the past. Respondent Bayside did not use the parts and, several months later, William Boland decided to purchase the parts for Respondent Shellmaker. William testified that he gave the parts to Respondent Bayside to help Dolores and Bryan Boland. According to William, Jones had given the parts to him, personally, rather than to Respondent Shellmaker.

The General Counsel and the Charging Party argue that the transactions involving the Turnabout were for less than fair market value. However, the Turnabout is a new piece of equipment and fair market value has not been established for its lease or its services. Further, the sale of the Turnabout was to Lara Enterprises and the lease from Lara Enterprises to Respondent Bayside. These significant transactions involved a third company, not alleged as an *alter ego* of either Respondent. The General Counsel and the Charging Party also argue that the dealings between Respondent Bayside and Lara Enterprises are less than arm's length. However, these facts appear to be irrelevant in light of the omission of Lara Enterprises from the third amended charge and the complaint. Lara Enterprises has dealt with the Union in the past but only on a project-by-project basis. It has had no continuing relationship with the Union.

D. The Bargaining Unit

As stated earlier, based on the allegation that Respondents are a single employer, the General Counsel contends that the multiemployer bargaining agreement must be extended to the employees of Respondent Bayside. Respondents argue, on the other hand, that, even if Respondents are a single employer, the employees of Respondent Bayside constitute a separate bargaining unit.

As stated earlier, Respondent Shellmaker has a long history of collective bargaining with the Union through the Association. Respondent Bayside has never bargained with the Union either individually or as part of the Association. Lara Enterprises has had a bargaining history with the Union, separate from Respondent Shellmaker and the Association. Port Sonoma Marina employees have not been included in the bargaining unit.

The employees of Respondents work separately for different customers. There is no evidence that the work performed by Respondents ever intersects or overlaps. The work performed by Respondent Bayside's employees apparently requires less skill and could easily be performed by Respondent Shellmaker's employees. Respondent Bayside's employees most likely could perform deckhand work for Respondent Shellmaker. The only evidence of interchange or contact between the employees of the two companies occurred when an employee of Shellmaker and two employees of Bayside were sent for training to Williams & Lane Diesel School. Respondent Bayside paid for the training of all three employees and was immediately reimbursed by Respondent Shellmaker for the cost attributed to its employee. As stated earlier, there is no evidence of common supervision of the employees.

Finally, there is no evidence that Respondent Shellmaker's business decreased or that Respondent Shellmaker's employees lost any work by reason of Respondent Bayside's entry into business.

II. ANALYSIS

"A company which has not agreed to be bound by the collective-bargaining contract of another company may nevertheless be held to that contract if it is an *alter ego* of the signing company or if it may be said to constitute a single employer with that company." *Peter Kiewit Sons' Co. and South Prairie Construction Co.*, 206 NLRB 562 (1973), vacated on other grounds 518 F.2d 1040 (D.C. Cir. 1975), *affd.* in part, vacated in part, and remanded, 425 U.S. 800 (1976). The Board and the courts have often used the terms *alter ego* and single employer interchangeably. The United States Supreme Court delineated what it meant by *alter ego* in *Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board, Hotel & Restaurant Employees, etc.*, 417 U.S. 249, 259, fn. 5 (1974):

It is important to emphasize that this is not a case where the successor corporation is the "alter ego" of the predecessor, where it is "merely a disguised continuance of the old employer." *Southport Petroleum Co. v. N.L.R.B.*, 315 U.S. 100, 106 (1942). Such cases involve a mere technical change in the structure or identity of the employing entity, frequently to avoid the effect of the labor laws, without any substantial change in its ownership or management.¹¹

The legal principles to be applied in determining whether two factually separate employers are in fact *alter egos* are well settled. The Board has found *alter ego* status where two enterprises have "substantially identical" management, business purpose, operation, equipment, customers, and supervision, as well as ownership." *Denzil S. Alkire a sole proprietorship; Upshur Enterprises, Inc.; and Mountaineer Hauling & Rigging, Inc.*, 259 NLRB 1323 (1982); *Crawford Door Sales Company, Inc.*, 226 NLRB 1144 (1976).

¹¹ See also *Don Burgess Construction Corporation d/b/a Burgess Construction*, 596 F.2d 378 (4th Cir. 1979), *enfg.* 227 NLRB 765 (1977).

Similarly, in determining whether enterprises constitute a single employer the controlling criteria are: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership. *Bacchus Wine Cooperative, Inc., and Bacchus Wine International*, 251 NLRB 1552 (1980); *N.L.R.B. v. Don Burgess Construction Corp.*, *supra*; *Radio & Television Broadcast Technicians Local Union 1264, IBEW v. Broadcast Service of Mobil, Inc.*, 380 U.S. 255 (1965); *Sakrete of Northern California, Inc.*, 137 NLRB 1220 (1962), *enfd.* 332 F.2d 902 (9th Cir. 1964), *cert. denied* 379 U.S. 961 (1965). The Board has stressed the first three factors, as well as the presence of control of labor relations. *Sakrete*, *supra*, 332 F.2d at 905, fn. 5. However, no one of the factors is controlling, nor need all of the "controlling criteria" be present. *Don Burgess*, *supra* at 384; *N.L.R.B. v. Welcome-American Fertilizer Company*, 443 F.2d 19, 21 (9th Cir. 1971). Single employer status, for purposes of the Act, depends upon all of the circumstances of the case and is characterized as an absence of an "arm's length relationship found among unintegrated companies." *Bacchus Wine*, *supra*; *Blumenfeld Theatres Circuit, et al.*, 240 NLRB 206, 215 (1979), *enfd.* 626 F.2d 865 (9th Cir. 1980).

In applying the above principles to the facts of this case, I note that the General Counsel carries an affirmative burden of proof and must show by a preponderance of the affirmative evidence on the record as a whole that the allegations of the complaint are in truth supported. See, e.g., *Western Tug and Barge Corporation*, 207 NLRB 163, fn. 1 (1973); *Service Marine Co.*, 189 NLRB 741 (1971); *L'Eggs Products, Inc. v. N.L.R.B.*, 619 F.2d 1337 (9th Cir. 1980). Suspicion alone does not suffice to prove an unfair labor practice. *Kings Terrace Nursing Home and Health Related Facility*, 229 NLRB 1180 (1977); *Cedar Rapids Block Co., Inc. and Cedar Sand and Gravel Co. v. N.L.R.B.*, 332 F.2d 880, 885 (8th Cir. 1964).

The formation of Respondent Bayside is certainly suspicious. The idea to create the business originated with William Boland. Bryan Boland moved to Port Sonoma and rented a trailer at a favorable rate, while awaiting the construction of the Turnabout. Until April 1981, Bryan Boland, awaiting the construction of the Turnabout, was an employee on Respondent Shellmaker's payroll. It is inconceivable that the trustees of an employee profit-sharing plan would lend \$50,000 to a company with assets of only \$900 without any collateral. Still worse, this undercapitalized company was headed by a 20-year-old inexperienced president. However, this loan was in fact made and later renegotiated with a more favorable interest rate to Respondent Bayside. Finally, William Boland gave certain pump parts to Respondent Bayside without charge and later purchased these same parts for Respondent Shellmaker at a cost of \$9,500.

However, beyond William Boland's aid in starting his nephew Bryan in business, there is no evidence that Respondent Bayside was in business to benefit Respondent Shellmaker rather than itself. William Boland divested himself of any ownership interest in Respondent Bayside 3 months prior to its commencement of operations. Respondent Bayside is apparently operating in the red but there is no evidence that it is drawing upon the assets of

Respondent Shellmaker. Thus, it appears that important elements for the finding of *alter ego* are missing.

Applying the applicable law to this case, beyond the suspicions that Bryan Boland is not operating Respondent Bayside, there is not a preponderance of the evidence that William Boland is operating the Company or that the two Companies constitute a single employer. As set forth above, the evidence does not prove interrelation of the operation of Respondents. Respondents have maintained separate books and records. They have separate customers. In dealing with Vista Bahia, Respondents clearly held themselves out as separate business entities and rebuked efforts by Vista Bahia to involve William Boland in Respondent Bayside's business dispute. Respondent Shellmaker pays Respondent Bayside for dredging work. While the General Counsel and the Charging Party argue that such work is performed for less than market value, no evidence of market value has been established. Moreover, since the Turnabout is unique and lacks experience, market value of its services would be difficult to determine. With the exception of Respondent Bayside's starting up period, there is little or no contact between the employees of Respondent Bayside and Respondent Shellmaker. The employees are separately supervised.

I also find that common ownership or management of Respondents has not been proven. While the General Counsel and the Charging Party strongly argue that Bryan Boland could not possibly manage the business of Respondent Bayside and that, therefore, William Boland must be managing the business behind the scenes, no hard evidence of William's participation in Respondent Bayside's business has been produced. I find it particularly significant that, although Respondent Bayside had been operating for a year, no evidence was adduced of any management or control asserted by William Boland over Respondent Bayside's business operations. William Boland divested himself of an ownership interest in Respondent Bayside prior to its commencement of operations.

The evidence does not show any common control of labor relations, the most significant criteria for determining single employer status. Bryan Boland controls labor relations for Respondent Bayside. No evidence was adduced to establish that William Boland or any other official of Respondent Shellmaker was involved in Respondent Bayside's labor relations. There is also no evidence that Bryan Boland was involved in Respondent Shellmaker's labor relations.

The evidence strongly suggests that Respondent Bayside would never have started in business without the aid of William Boland.¹² However, I do not find that fact to be conclusive of the result herein. Even if William Boland lent or gave his nephew the funds to go into business, it would not necessarily determine *alter ego* or single employer status. What appears critical in such a case is whether there were any strings attached to such a

¹² Similarly, Respondent Bayside would not be in business but for the aid of Dolores Boland. If Lara Enterprises had chosen to operate the Turnabout itself or to lease the dredge to another company, Respondent Bayside would not be in business. Respondent Bayside's contractor's license lists Dolores Boland as responsible managing officer.

loan or gift. In other words, there must be some control retained by William Boland to support a finding of *alter ego* or single employer.¹³ In sum, I find the record evidence insufficient to support a finding that William Boland retained control over Respondent Bayside. Accordingly, I find that the General Counsel has failed to sustain its burden of proof.

Upon the foregoing findings of fact, analysis, and the entire record, I make the following:

CONCLUSIONS OF LAW

1. The employer-members of Dredging Contractors Association are employers engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. By virtue of its membership in said Association, Respondent Shellmaker is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. Operating Engineers, Local Union No. 3, International Union of Operating Engineers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

¹³ In *Frederick Truck Service, Inc. and FTL, Inc.*, 259 NLRB 1294 (1982), the Board held that the mere fact that two companies were dealing through family members did not require a finding of *alter ego*. Absent evidence that a loan transacted between a father and his two sons was not conducted in an arm's length atmosphere, the Administrative Law Judge refused to "speculate" that the father retained financial control over his sons' business enterprise.

4. The employees of the employer-members of the Association performing work within the scope of the Association-Union contract constitute an appropriate unit within the meaning of Section 9(b) of the Act.

5. The General Counsel has failed to establish by a preponderance of the evidence that Respondent Shellmaker and Bayside, as alleged in the complaint, violated Section 8(a)(5) and (1) of the Act by failing or refusing to apply the collective-bargaining agreement between the Union and the Association to the employees of Respondent Bayside.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER¹⁴

The allegations of the complaint that Respondent Shellmaker, Inc., and Bayside Dredging Co., Inc., have engaged in unfair labor practices having not been established, the complaint is dismissed in its entirety.

¹⁴ All outstanding motions inconsistent with this recommended Order hereby are denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.